

**COMMONWEALTH OF KENTUCKY  
KENTUCKY BOARD OF TAX APPEALS  
FILE NO. K03-R-27**

**MARQUETTE TRANSPORTATION  
COMPANY, INC.**

**APPELLANT**

**v.**

**ORDER NO. K-19358**

**FINANCE AND ADMINISTRATION CABINET  
DEPARTMENT OF REVENUE  
COMMONWEALTH OF KENTUCKY**

**APPELLEE**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL  
ORDER**

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Marquette Transportation Company, Inc. appeals the final ruling of The Revenue Cabinet dated November 26, 2003. In that ruling the Cabinet determined that previously conducted audits of Marquette's Kentucky Corporation Income Tax Returns for taxable periods ended February 28, 1991 through February 29, 2000 and Kentucky Corporation License Tax Returns for taxable periods ended February 28, 1995 through February 29, 2000 had correctly adjusted Marquette's payroll factor to 100% Kentucky.

In that final ruling the Cabinet further denied Marquette's refund claim for 2001.

This matter came on for hearing before the full board on February 23, 2005. Both parties presented evidence by way of stipulations, testimony and submitted for the record various items of documentary proof. Supplemental briefs on behalf of both parties to this appeal were filed on March 25, 2005.

After considering the entire record in this matter the Board enters the following.

## FINDINGS OF FACT

### ISSUE # 1 THE 2001 REFUND CLAIMS

The Board finds that the undisputed amount of Marquette's 2001 refund claims total \$67, 397. The Board further finds that there exists no evidence in the record to support the Cabinet's denial of these claims. The Board further finds that Marquette has demonstrated by a preponderance of the evidence that Marquette made payments of estimated tax which by final and accepted returns resulted in Marquette having made overpayments in excess of tax due.

### ISSUE # 2 THE APPLICATION OF KRS 141.120(8)(B) TO MARQUETTE

In calculating Marquette's Kentucky Corporation Income Tax liability and its Kentucky Corporation License Tax liability during the audited periods, the parties both agreed that KRS 141.120 provided the statutory scheme by which a fair and reasonable apportionment of tax due to Kentucky must be calculated. That statute provides for calculating apportionment according to a "payroll factor" which is defined as follows:

**(b) The payroll factor is a fraction, the numerator of which is the total amount paid or payable in this state during the tax period by the corporation for compensation, and the denominator of which is the total compensation paid or payable by the corporation everywhere during the tax period. Compensation is paid or payable in this state if:**

- 1. The individual's service is performed entirely within the state;**
- 2. The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or**
- 3. Some of the service is performed in the state and the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.**

The Cabinet has admitted that its paraphrasing of the statutory language in its final ruling did not accurately apply the statute in question to the facts of this case, but insists that this was a typographical error. The Cabinet maintains that the final ruling is still valid under Marquette's corrected reading of the statute.

As such this case turns upon our determination whether the compensation paid to a certain class of Marquette employees is "paid or payable in this state" and therefore included in the numerator of the statutorily created "payroll factor" or not.

Marquette contends that the compensation paid to these employees should not be included in the numerator of the "payroll factor" because their "base of operations" is outside of Kentucky and because the place from which their service is "directed and controlled" is not Marquette's offices in Paducah but that their "service" is directed and controlled from the boat itself under the autonomous control of tow boat captains and pilots.

The Cabinet contends that the compensation of these employees should be included in the numerator of the "payroll factor" because their base of operations is Marquette's corporate offices in Paducah Kentucky, or alternatively that they have no base of operations but that their service is directed and controlled from Paducah.

Both parties agree that there does not exist any controlling authority other than the language of the statute itself from which this issue can be determined.

Marquette urges that we interpret the legislature's reference to an employee's "base of operations" to mean "the place from where they begin their work, and where they return to receive instructions from Marquette". Marquette suggests that because their employees leave their homes in foreign states and go directly to the various

boarding locations to begin their typical 30 days on the river, that the employee's "base of operations" is the employee's home.

Marquette offered proof that tow boat captains and pilots are strong willed, independent commanders of their vessels who are in total control of all aspects of the life and work of their crew. As such Marquette urges that the service of its employees is "directed and controlled" by the captains and pilots aboard the tow boats, not from its headquarters in Paducah.

In making our determination we must apply the statute according to its plain meaning. A "base" of operations in its ordinary usage means a central headquarters. For example, although military pilots may fly missions, refuel in mid air, take off and land in many far away places all pilots have a home base. Here the evidence was clear that the tow boat captains, pilots and crew may stay on the river and stay on the move for weeks on end but they are emailed their assignments from Paducah, the sales department is in Paducah, the safety department is in Paducah and the barge building decisions which are then carried out by the captains are made in Paducah. Paducah is the headquarters of the entire operation.

Furthermore, to accept the argument made by Marquette that the specific employees at issue in this case are not directed and controlled from Paducah would require that we engage in a form of statutory construction which would overstretch the scope of our authority.

There was no dispute that Marquette's captains and pilots are in complete control of their vessel's and its crew. However the captain's control over his crew is solely the result of his position in the chain of command. No matter how strong willed or

independent a captain might be, Marquette would not seriously suggest that the captain could take the boat wherever he wanted to take it, pick up only the barges he wanted to pick up, or take them wherever he wanted to take them. The captains act in order to execute the plans of their superiors at Marquette. By the same token the actions of the crew are in furtherance of the captain's orders only as an adjunct to the captain's obligation to execute the directions issued from headquarters in Paducah. The crew acts as part of the chain of command which is controlled from Paducah.

As such it is the finding of this Board that the base of operations of all Marquette employees is Paducah Kentucky from which their service is directed and controlled.

However, before any of the compensation paid to an employee of Marquette can be included in the numerator of the "payroll factor" for the purpose of determining whether their compensation is "paid or payable in this state" we must next examine whether or not these employees perform some service in Kentucky.

Marquette challenged the Cabinets final ruling that these employees were "performing some service in Kentucky" which triggered Kentucky's right to tax Marquette. This situation implicates the Commerce Clause of the United States Constitution as well as the questions of fair apportionment and the requirement that the tax be closely related to the services provided by Kentucky.

Marquette submitted persuasive authority that the Mississippi River as it flows for approximately 63 miles past the Kentucky shoreline is maintained by the United States. Marquette has submitted authority to suggest that Kentucky does not provide sufficient services under these circumstances to warrant the imposition of these taxes. However, each of these additional arguments turns on what if any service the employees

of Marquette are performing in Kentucky.

It was undisputed that the only “service” arguably performed in Kentucky by the included employees was their presence on a tow boat as it moved along the Mississippi River adjacent to approximately 63 miles of Kentucky shoreline and that Marquette’s boats never stop in Kentucky for any reason.

It was also undisputed that Kentucky’s border along this 63 miles of Mississippi River was somewhere in the middle of the flow. Therefore, if Marquette’s boats stayed on the other far side of the river they would never be in Kentucky waters to begin with. If the boats straddled the border, employees on one side of the boat may be in Kentucky while employees on the other side may not be. If all the crew except the captain and pilot were eating dinner, or sleeping as the boat passed Kentucky, no “services” would be performed here.

Our point is simply this; we are satisfied by the evidence offered by Marquette and hereby find that the Cabinet has no reasonable basis in fact to have concluded that the Marquette employees under consideration in this case were in fact performing services in Kentucky sufficient to bring them within the purview of KRS 141.120(8)(b).

This determination being dispositive of the case, we do not reach the additional issues raised regarding fair apportionment and constitutional challenges.

### **CONCLUSIONS OF LAW**

Wherefore, having found that the Appellant has met its burden of proof the Board concludes that the final ruling of the Cabinet is without factual support and will be set aside. We further conclude that the Appellant is entitled to the tax refunds for 2001 overpayments as prayed for in its petition of appeal.

## **ORDER**

It is the **ORDER** of the Board that the Kentucky Corporation Income Tax and Kentucky Corporation License Tax liabilities as assessed and made final by order of the cabinet on November 26, 2003 are hereby set aside.

It is the further **ORDER** of the Board that the Appellant shall recover from the Commonwealth the tax refunds for 2001 overpayments as prayed for in its petition of appeal.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

**DATE OF ORDER  
AND MAILING: June 23, 2005**

**FULL BOARD CONCURRING**

**NANCY MITCHELL  
CHAIR**



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